No. 03-573

IN THE

Supreme Court of the United States

ESSEF CORPORATION, PAC-FAB, INC. and STRUCTURAL EUROPE, N.V.,

Petitioners,

v.

JOHN AND JOYCE SILIVANCH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN AND JOYCE SILIVANCH

ORIN SNYDER
Counsel of Record
STEVEN M. HAYES
ROBERT A. JACOBS
PARCHER, HAYES & SNYDER
A PROFESSIONAL CORPORATION
500 Fifth Avenue, 38th Floor
New York, NY 10110
(212) 382-0200

Counsel for Respondents John and Joyce Silivanch

184245

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
1. Factual and Procedural Background.	2
2. The Second Circuit's Opinion.	5
Reasons for Denying the Petition	8
I. The Opinion Below Properly Interpreted and Applied this Court's Decision in *Pioneer*.	9
II. Every Court of Appeals to Consider the Question Has Held that A Failure to Follow the Clear Dictates of a Rule Does Not Ordinarily Constitute Excusable Neglect.	15
III. This Case Would Be An Exceedingly Poor Vehicle For Resolving the Question Presented.	22
Conclusion	26

TABLE OF CITED AUTHORITIES

Page

Cases:

Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996 (11th Cir. 1997) ..... *passim*

Bateman v. United States Postal Service, 231 F.3d 1220 (9th Cir. 2000) 20

Canfield v. Van Atta Buick/GMC Truck Inc., 127 F.3d 248 (2d Cir. 1997) 13

Cheney v. Anchor Glass Container Corp., 71 F.3d 848 (11th Cir. 1996) 19

Committee for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814 (9th Cir. 1996) 16, 20

Deym v. von Fragstein, 127 F.3d 1102 (6th Cir. 1997) 16

Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc., 270 F.3d 1 (1st Cir. 2001) 16, 17

Hable v. Pairolero, 915 F.2d 394 (8th Cir. 1990) .. 22

Hamzi v. Minnesota Mut. Life Ins. Co., 196 F.3d 372 (2d Cir. 1999) 22

Cited Authorities

Page

In re: Vitamins Antitrust Class Actions, 327 F.3d 1207 (D.C. Cir. 2003) 17, 21

In re Worldwide Web Sys., Inc., 328 F.3d 1291 (11th Cir. 2003) 19

Kyle v. Campbell Soup Co., 28 F.3d 928 (9th Cir. 1994) 20, 22

Lowry v. McDonnell Douglas Corp., 211 F.3d 457 (8th Cir. 2000) 6, 16, 17

Malone v. Avenenti, 850 F.2d 569 (9th Cir. 1988) .. 22

Midwest Employers Cas. Co. v. Williams, 161 F.3d 877 (5th Cir. 1998) 16

Oda v. Transcon Lines Corp., 650 F.2d 231 (10th Cir. 1981) 22

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993) ..... *passim*

Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132 (7th Cir. 1996) ..... *passim*

Stutson v. United States, 516 U.S. 193 (1996) 6, 13

Truett v. Johns-Manville Sales Corp., 725 F.2d 1301 (11th Cir. 1984) 22

Cited Authorities

Page

United States v. Brown, 133 F.3d 993 (7th Cir. 1998) 19

United States v. Prairie Pharmacy, Inc., 921 F.2d 211 (9th Cir. 1990) 20

Yesudian ex rel. United States v. Howard University, 270 F.3d 969 (D.C. Cir. 2001) 21

Rules:

Fed. R. App. P. 4 .....6, 12, 17, 21

Fed. R. App. P. 4(a)(1) 23

Fed. R. App. P. 4(a)(1)(A) 4

Fed. R. App. P. 4(a)(5) ..... *passim*

Fed. R. App. P. 4(a)(6) 4, 5

Fed. R. App. P. 4(a)(5)(A) 5

Fed. R. App. P. 4(a)(5)(A)(ii) 4

Fed. R. App. P. 4(a)(5)(B) 5, 22, 23

Fed. R. Bank. P. 9006(b) 10

Fed. R. Civ. P. 54(b) 3, 5

U.S. Sup. Ct. Rule 10 20

STATEMENT OF THE CASE

Petitioners seek review of a lower court's unremarkable, garden-variety application of settled law to particular facts. The Second Circuit below correctly dismissed Petitioners' appeal from a verdict against them because they filed an untimely notice of appeal. Faithfully applying the multi-factor equitable balancing test set forth by this Court in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), the court flatly rejected Petitioners' effort to excuse their untimely filing on the ground that an off-the-cuff comment made by another party's lawyer at a routine scheduling conference somehow "misled" Petitioners about the deadline for their notice of appeal. The court held that such a negligent failure to follow the clear dictates of a procedural rule did not constitute the "excusable neglect" required to excuse an untimely filing.

In a desperate attempt to manufacture an issue worthy of this Court's attention out of the fact-bound, case-specific decision below, Petitioners contend that the Second Circuit "fundamentally restructured" the *Pioneer* test by supposedly focusing exclusively on the so-called "reason for delay" factor and ignoring all other equitable factors – a holding that, according to Petitioners, conflicts with *Pioneer* and with numerous courts of appeals' decisions interpreting and applying *Pioneer*. Petitioners' argument is based upon an outright misreading of the court's decision below. The Second Circuit properly applied this Court's decision in *Pioneer*, and reached a result – rejecting an "excusable neglect" claim where a party fails to follow an unambiguous procedural rule – that is wholly consistent with the result reached by every court of appeals applying *Pioneer* to similar acts of gross attorney negligence. There is no conflict whatsoever between the *actual* decision below and *Pioneer* or the decisions of other courts of appeals, and thus no reason to grant the petition.

The petition also should be denied because this case is an exceedingly poor vehicle in which to resolve Petitioners' (flatly erroneous) contention that the Second Circuit improperly placed exclusive emphasis on *Pioneer*'s "reason for delay" factor. That question – even if it were raised by the decision below (and plainly it is not) – is entirely academic in this case because (i) the district court lacked jurisdiction to excuse Petitioners' untimely filing under *Pioneer* due to Petitioners' failure timely to serve its motion on all of the parties, and (ii) Petitioners' bad faith in initially arguing for an extension of time based on a fabricated excuse (a false claim that they never received notice of the final judgment) is an *additional Pioneer* factor supporting the Second Circuit's holding.

In these circumstances, review by this Court plainly is unnecessary and unwarranted, and Respondents accordingly request that the petition be denied.

1. Factual and Procedural Background.

Respondent John Silivanch sustained permanent brain damage after contracting Legionnaire's Disease on board a Celebrity cruise ship. The United States Centers for Disease Control and Prevention traced the outbreak of the disease to the ship's spa filters that Petitioners Essef Corporation, Pac-Fab, Inc. and Structural Europe N.V. ("Petitioners" or "Essef") designed, manufactured, and distributed. Respondents John and Joyce Silivanch, along with twenty-one other victims of the outbreak, including some who died as a result, filed suit against Celebrity Cruise Lines Inc. and Fantasia Cruising, Inc. ("Celebrity") and Petitioners, alleging strict products liability, breach of implied and express warranty, and gross negligence. Celebrity filed cross-claims against Petitioners for indemnification and other damages. Pet App. 4a.

In May 2000, the parties agreed to try these cases using a "bellwether" procedure. Under that procedure, Respondents John and Joyce Silivanch's case would be tried before a jury on all issues, and the liability and damages findings of that jury (with the exception of findings on proximate cause and compensatory damages) would then be binding in all of the remaining cases. After a six-week trial, a jury found that the defendants were liable to Respondents and awarded them $2.66 million in compensatory damages. The jury also found that Petitioners had an obligation to indemnify Celebrity in full, and that Petitioners were obligated to pay $4.2 million in punitive damages to Respondents and the other plaintiffs, and another $2.8 million to Celebrity. The district court later apportioned the punitive damages award among those plaintiffs who, by trial or settlement, had established the requisite proximate cause, Pet. App. 5a, and awarded Respondents prejudgment interest.

On January 25, 2002, the district court issued and mailed to all parties an order pursuant to Fed. R. Civ. P. 54(b) directing entry of final judgment in each case, and the final judgment itself, denominated the "Second Supplemental Judgment." (The Second Supplemental Judgment ordered post-judgment interest for plaintiffs that had been allocated punitive damages, and recited the prior compensatory awards, prejudgment interest, and punitive damages awards for each plaintiff). Although the Rule 54(b) order was not entered on the docket sheet for the Silivanch Respondents (it was entered on the docket sheets for all other plaintiffs), the final judgment was entered on Respondents' docket sheet on January 28, and mailed to all parties, along with a notice of right to appeal. On February 5, 2002, Robert A. Jacobs, counsel for Respondents, wrote a letter to Petitioners' counsel, Robin G. Weaver, in which Jacobs reminded Weaver that final judgment had been entered on January 28, 2002. Weaver acknowledged receipt of the Jacobs

letter in writing on February 8, and subsequently acknowledged in telephone conversations with Jacobs that final judgment had been entered on January 28. Pet App. 6a-7a.

On February 19, counsel for Celebrity (James M. Hazen), Petitioners (Weaver), and several plaintiffs (Brendan Burke) conducted a pre-argument telephone conference with Second Circuit staff counsel regarding a separate appeal by other plaintiffs. The staff counsel, who was attempting to set a briefing schedule that took into account Petitioners' expected appeals in this case, asked the lawyers when they would know if they were planning to pursue such appeals. In response, Hazen "posited" March 4, 2002 as the "control date" for the appeals in this case, but admittedly had not actually calculated the deadline himself because Celebrity intended to appeal only if Petitioners did. Based on Hazen's statement, Weaver noted March 4 in his calendar as the last day for filing a notice of appeal in this case. Pet. App. 7a.

Petitioners filed a notice of appeal from the January 28, 2002 judgment on March 1, 2002, even though the mandatory and jurisdictional thirty-day deadline for that filing expired on February 27 under Fed. R. App. P. 4(a)(1)(A). On March 29, Petitioners filed a motion in the district court in which they argued that they were entitled to re-open the period for filing a notice of appeal under Fed. R. App. P. 4(a)(6) due to their claimed lack of notice of the entry of the final judgment on January 28, 2002. In the alternative, Petitioners argued that they were entitled to an extension of time in which to file a notice of appeal under Fed. R. App. P. 4(a)(5)(A)(ii), arguing that "excusable neglect" forgiving their untimely filing existed because their counsel had been misled by Hazen's statement at the scheduling conference – a mistaken belief, they asserted, that "persisted" due to their alleged lack of notice of the entry of final judgment.

Pet. App. 8a-9a.[1] Petitioners failed timely to serve their motion for an extension of time on fourteen of the twenty-two plaintiffs whose cases Petitioners sought to appeal, including seven plaintiffs whose punitive damage awards Petitioners sought to attack in their appeal of Respondents' bellwether case. *See* Fed. R. App. P. 4(a)(5)(B) (requiring notice to all parties within Rule 4(a)(5)(A)'s thirty-day grace period); Memorandum in Support of Plaintiffs'-Appellees' Motion to Dismiss the Appeals for Lack of Jurisdiction 7.

At oral argument on Petitioners' motion, Petitioners conceded that they had, in fact, received notice of the January 28 final judgment. As a consequence, they abandoned their request to re-open the filing time period under Rule 4(a)(6), and reformulated their "excusable neglect" argument to omit any reference to their prior, now demonstrably false, assertion regarding their claimed lack of notice of the final judgment. Instead, they limited their "excusable neglect" argument to alleged confusion in the docket and to Hazen's statement at the scheduling conference. Pet. App. 9a. The district court granted Petitioners' motion on May 15. Petitioners filed a second notice of appeal on May 22, at which point Respondents moved to dismiss Petitioners' appeal. Pet. App. 9a.

2. The Second Circuit's Opinion.

The Second Circuit reversed the district court's order granting an extension of time under Rule 4(a)(5), and dismissed the appeal. After discussing its precedents applying *Pioneer*'s

1. Petitioners subsequently raised the argument that the 30-day period had not even begun to run because the January 25 Rule 54(b) order had not been entered in the *Silivanch* docket. Both the district court and the Second Circuit rejected this argument, Pet. App. 13a-16a, and Petitioners do not seek review of this issue in their petition.

"more liberal" definition of "excusable neglect" to Rule 4(a)(5) cases, Pet. App. 16a-17a,[2] the court proceeded to examine Petitioners' claim of "excusable neglect" under *Pioneer*'s four-factor test. It expressly agreed with the district court's conclusion that the first *Pioneer* factor – the risk of prejudice – favored an extension of time, reasoning that the hardship to Petitioners in being denied "the opportunity to appeal a multimillion dollar verdict" outweighed any prejudice to Respondents resulting from a modest time extension. Pet. App. 19a; *id.* (noting that, in the context of "excusable neglect" claims under Rule 4(a)(5), the "'prejudice to the non-movant will often be negligible'") (quoting *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000)). And for similar reasons, the court held that the second *Pioneer* factor – the length of the delay – favored Petitioners because Rule 4(a)(5) requires a motion for an extension of time to be filed within thirty days of the last day for filing a timely notice of appeal. Pet. App. 17a.

Even though these two *Pioneer* factors pointed in favor of an "excusable neglect" finding, and despite the court's expression of "considerable sympathy for those who, through mistakes . . . lose substantial rights" by missing deadlines, Pet. App. 20a, the court nonetheless concluded that Petitioners' neglect could not be excused. It explained that "the legal system would groan under the weight of a regimen of uncertainty in

---

2. Respondents note that, although this Court subsequently observed in *Stutson v. United States*, 516 U.S. 193 (1996), that six courts of appeals unanimously had held that *Pioneer* applies to Rule 4 cases, this Court has never expressly so held. Thus, in order even to reach the merits of the question presented by Petitioners, this Court first would have to decide this threshold question and formally extend *Pioneer*'s framework to the Rule 4 context. This potential barrier to this Court's ability to reach the merits of the petition also counsels against a grant of certiorari.

which time limitations were not rigorously enforced – where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of enforcing the bar." *Id.* at 20a-21a. Accordingly, the court reaffirmed its longstanding rule that the "equities will *rarely if ever* favor a party who 'fail[s] to follow the clear dictates of a court rule'" and that "where 'the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, *in the ordinary course*, lose under the *Pioneer* test.'" Pet. App. 18a (quoting *Canfield v. Van Atta Buick/GMC Truck Inc.*, 127 F.3d 248, 250-51 (2d Cir. 1997)) (per curiam) (emphasis added); *id.* at 21a (stating that the "mere 'possibility that a court may properly find excusable neglect [where it consists of inadvertence, ignorance of the rules, or mistakes construing the rules does not] alter[ ] the principle that failure to follow the clear dictates of a court rule *will generally not constitute such excusable neglect*'") (quoting *Canfield*, 127 F.3d at 250) (alterations in original) (emphasis added).

Applying this rule, the court held that it was

> compelled, *on these facts*, to conclude that the district court abused its discretion when it decided that Essef's counsel's determination of the wrong date by which Essef had to file a notice of appeal in sole reliance on a remark by counsel for another party during a scheduling conference for another appeal constituted excusable neglect.

Pet. App. 25a (emphasis added); *id.* at 23a (finding "nothing exceptional about Hazen's comment or its context that should relieve Essef of responsibility for its own compliance with the rules of procedure") Finally, the court considered the argument that a so-called "mistake of fact" in following the clear dictates

of a rule is more easily excused than a "mistake of law." It held that in the circumstances of this case – *i.e.*, where an attorney knew of the existence of a thirty-day time limitation "but neglected to consult a calendar to determine when it expired," *id.* at 23a – no such distinction meaningfully could be drawn for purposes of assessing Petitioners' culpability. *Id.*[3]

REASONS FOR DENYING THE PETITION

The petition should be denied for three reasons. *First*, there is no conflict whatsoever between the decision below and this Court's decision in *Pioneer*. The Second Circuit applied *Pioneer*'s four-factor test governing "excusable neglect" for untimely filings, and, pursuant to that test, properly concluded that Petitioners' negligent and unexplained failure to follow an unambiguous procedural rule constituted inexcusable neglect. *Second*, the alleged conflicts between the Second Circuit's decision and the decisions of other courts of appeals are equally fanciful. In fact, the courts of appeals are in *complete unanimity* in rejecting claims of "excusable neglect" that, like Petitioners', consist of nothing more than a lawyer's negligent failure to follow an unambiguous procedural rule. *Third*, the petition should be denied because this case is an exceedingly poor vehicle in which to address Petitioners' contention that a court may not

3. The court also flatly rejected Petitioners' claim that "excusable neglect" existed because of confusion in the record – specifically, confusion as to when the judgment below became final, thus triggering the thirty-day notice of appeal period. It noted that Petitioners had not relied upon any such confusion in their Rule 4(a)(5) motion, and that Petitioners received clear notice that final judgment had been entered on January 28, 2002. Accordingly, the court affirmed the district court's implicit finding that the *sole* cause of Petitioners' late filing was their reliance on the statement by Celebrity's counsel, Pet. App. 25a-26a – a cause that, for reasons explained above, is legally insufficient to excuse Petitioners' untimely filing.

focus exclusively on the "reason for delay" factor. It is a poor vehicle in which to address that question because (i) the district court lacked authority to grant an extension of time under *Pioneer* due to Petitioners' failure timely to serve their motion on all the parties, and (ii) even if the court had such authority, uncontradicted evidence of Petitioners' bad faith in seeking an extension – an additional *Pioneer* factor that Petitioners conveniently ignore – provides an additional equitable ground supporting the Second Circuit's holding, and thus renders Petitioners' (misplaced) challenge to the court's "exclusive" emphasis on one *Pioneer* factor completely academic.

I. The Opinion Below Properly Interpreted and Applied this Court's Decision in *Pioneer*.

Petitioners' main argument in seeking review by this Court is that the Second Circuit's opinion "fundamentally restructures," and indeed "open[ly] disregard[s]," this Court's decision in *Pioneer*. Pet. 7-8. The Second Circuit's opinion does no such thing. To the contrary, the court below faithfully applied *Pioneer*'s equitable balancing test to the particular facts of this case, and properly concluded that Petitioners' negligence in failing to calculate a deadline under an unambiguous procedural rule – their counsel having chosen instead to rely upon a date "posited" by another party's attorney – did not constitute excusable neglect. There is plainly no conflict between this holding and *Pioneer*, and thus no need or justification for this Court to review what is essentially a lower court's garden-variety application of well-settled law to case-specific facts.

In *Pioneer*, this Court interpreted the term "excusable neglect" in the context of a Bankruptcy Rule permitting untimely filings upon a showing that "the failure to act was the result of excusable neglect." *Pioneer*, 507 U.S. at 383 & n.2 (quoting

Fed. R. Bank. P. 9006(b)). The Court's principal holding was that "excusable neglect" is not limited to circumstances beyond the reasonable control of the late filer, and thus is potentially satisfied even where the late filer is somehow at fault. *Id.* at 388. The Court went on to articulate standards governing the requirement that the neglect be "excusable" – standards it intended to "deter . . . parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve." *Id.* at 395. The Court held that the determination of "what sorts of neglect will be considered 'excusable'" is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* These circumstances include "[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.*[4] The Court further observed that "inadvertance, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect." *Id.* at 392. Given the lack of prejudice to the non-movant in granting an extension, the good faith of the movant, and a "dramatic ambiguity" in the "unusual form of notice" causing the movant's counsel to miss the filing deadline, the Court concluded that the neglect at issue was excusable. *Id.* at 398-99.

The Second Circuit's decision below was fully consistent with these principles. Petitioners' entire argument to the contrary is based on their unfounded assertion that the Second Circuit "held that a finding on a single *Pioneer* factor [*i.e.*, the reason

4. Reaffirming the longstanding rule that "clients must be held accountable for the acts and omissions of their attorneys," the Court also held that neglect by an attorney is just as relevant to the excusable neglect inquiry as is neglect by a party itself. *Id.* at 396.

for delay] extinguishes a district court's discretion to weigh any other relevant factors," and that, in so holding, the court "fundamentally restucture[d]" the *Pioneer* equitable balancing test. Pet. 7; *see also id.* at 9-10 (asserting that Second Circuit treated the "reason for delay" *Pioneer* factor as "dispositive," thus rendering "superfluous" the remaining three *Pioneer* factors).

This Court need only read the lower court's opinion to recognize the transparent falsity of Petitioners' assertion. As shown above, *see supra* at 5-8, the Second Circuit in no way held that the "reason for delay" factor is necessarily "dispositive," nor did it treat as "superfluous" the remaining *Pioneer* factors. On the contrary, the court expressly held that two of the *Pioneer* factors – the length of the delay, and the prejudice to the non-movant – actually supported Petitioners' request for an extension.[5] Yet, notwithstanding these two equitable factors weighing in Petitioners' favor, the court nonetheless concluded that Petitioner failed to demonstrate "excusable neglect."

The court reached this conclusion based on the well-settled rule that a "failure to follow the clear dictates of a court rule

---

5. Respondents argued in support of their motion to dismiss the appeal that Petitioners' lack of good faith in seeking an extension of time in which to file a notice of appeal – an additional *Pioneer* factor – argued heavily against any finding of excusable neglect. Memorandum in Support of Plaintiffs'-Appellees' Motion to Dismiss the Appeals for Lack of Jurisdiction 14-15. The Second Circuit declined to address this argument, noting only that, as a general matter, good faith is rarely at issue in excusable neglect cases. Pet. App. 17a. As explained below, Petitioners' lack of good faith in initially arguing for an extension of time based in part on a completely fabricated assertion – *i.e.*, their false claim to having never received notice of the January 28 final judgment – makes this case a particularly poor vehicle in which to address the question presented by the petition. *See infra* at 24-26.

will generally not constitute . . . excusable neglect." Pet. App. 21a; *see id.* at 18a (stating that the "equities will rarely if ever favor a party who fail[s] to follow the clear dictates of a court rule, and that "where the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test"). Here, the applicable court rule imposing a thirty-day time period for the filing of a notice of appeal – Rule 4 – is unambiguous. And Petitioners' only "explanation" for their failure to follow that "clear dictate[]" was their counsel's decision not to calculate the filing deadline simply because another party's lawyer "posited" the (incorrect) date at a scheduling conference. The court below held that, "*on these facts*," it was compelled to conclude that Petitioner failed to establish excusable neglect. Pet. App. 25a (emphasis added); *see also id.* at 19a ("In our view, a lawyer's dependence entirely on a statement made *under such circumstances* in determining the filing deadline for a notice of appeal is not 'excusable' as we have used that word in related contexts.") (emphasis added).

In other words, the plain language of the opinion demonstrates conclusively that the Second Circuit engaged in the very equitable balancing that Petitioners erroneously claim the court eschewed. Petitioners' real complaint seems to be with the equitable rule – applied by the court below and adopted by every federal court of appeals to consider it (*see infra* at II) – that a failure to follow the "clear dictate" of a court rule *ordinarily* precludes a finding of excusable neglect. But Petitioners could not, and do not, argue that that rule is in any way inconsistent with *Pioneer* because, as Petitioners concede, Pet. 10 n.2, this Court recognized and endorsed that very rule in *Pioneer* itself. *Pioneer*, 507 U.S. at 392 (stating that

"inadvertance, ignorance of the rules, or mistakes construing the rules *do not usually constitute* excusable neglect.").[6]

Unable to demonstrate any conflict at all between that rule and *Pioneer*, Petitioners' request for review ultimately boils down to their footnote suggestion that that rule somehow does not apply to the facts of this case. Pet. 10 n.2 (explaining away *Pioneer*'s statement that inadvertance, ignorance of the rules, and mistakes construing the rules are presumptively inexcusable on the ground that "here, there is no contention that Essef's lawyer acted inadvertently with regard to the existence of Federal Rule of Appellate Procedure 4, ignored the content of that rule, or mistakenly construed that rule"; rather, Essef's lawyer here allegedly made only a "mistake of fact in calculating the appeal period").

The suggestion is, in a word, extraordinary: If the failure to calculate an applicable deadline for oneself – relying instead on the guestimate of *another party's attorney* – is not "inadvertence," or a plain disregard of the rules, it is difficult to

---

6. Petitioners suggest that there is some inconsistency between this rule and the "liberal understanding" of excusable neglect adopted in *Pioneer*. Pet. 10; *Stutson v. United States*, 516 U.S. 193 (1996). But the suggestion is plainly frivolous because, as noted, this Court recognized, and endorsed, that very same rule in *Pioneer*. Moreover, Petitioners overlook the critical fact that the Second Circuit, as the court explained below, modified its former categorical rule precluding any finding of "excusable neglect" in these circumstances precisely because of *Pioneer*'s "more liberal" framework. Pet. App. 16a (explaining that *Pioneer* led Second Circuit to modify prior rule that "the excusable neglect standard *can never be met* by a showing of inability or refusal to read and comprehend the plain language of the federal rules," and to adopt instead the rule that such failures ordinarily do not constitute excusable neglect) (emphasis added); *see also Canfield*, 127 F.3d at 250 (observing that prior *per se* rule does not "perdure after *Pioneer*").

see what would be. *See Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996) (stating, in context of claimed excusable neglect based on misreading of unambiguous rules, that "[i]f there was 'excusable' neglect here, we have difficulty imagining a case of inexcusable neglect"). Moreover, as the Second Circuit properly held, Petitioners' attempt to characterize their lawyer's negligent failure to apply the governing law himself as some sort of innocuous "mistake of fact" is completely unpersuasive and must fail. Pet. App. 22a-23a (holding that there is no justification for distinguishing between an attorney's failure to understand the applicable time period set forth by a clear rule, an attorney's miscalculation of the deadline under that rule, or, as here, an attorney's negligent failure even "to consult a calendar to determine" when the deadline expired).[7] In any event, this fact-bound, case-specific

---

7. Petitioners argue, unconvincingly, that the "Second Circuit has effectively rendered the 'excusable neglect' standard of Rule 4 a nullity with no room to operate" because "there is nothing in terms of culpability to distinguish a mistake of fact from any other type of neglect that might cause a notice of appeal to be untimely." Pet. 11 n.2. Whatever the merit of distinguishing degrees of culpability between a "mistake of law" and a true "mistake of fact," *see Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) (distinguishing prior "mistake of fact" case concerning "whether a message was delivered"), the "mistake" at issue in this case – a failure even to consult or to apply governing law in reliance on the surmise of another party's attorney – cannot meaningfully be classified as a mistake of fact. Thus, Petitioners' characterization of the Question Presented in this case as the question whether an attorney's "mistake of fact" precludes consideration of other equitable factors is doubly incorrect: The court below did not hold that Petitioners' mistake precludes any such equitable consideration, and that "mistake" was quite obviously not a "mistake of fact." Moreover, regardless of the label applied, the unstated premise of Petitioners' argument – *i.e.*, that an attorney's negligent failure even to consult the

(Cont'd)

question of whether Petitioners' attorney's conduct constitutes "inadvertence, ignorance of the rules, or mistakes construing the rules" within the meaning of *Pioneer,* or under the general rule that a failure to follow an unambiguous rule ordinarily does not constitute "excusable neglect," is quite obviously undeserving of review by this Court.

II. Every Court of Appeals to Consider the Question Has Held that A Failure to Follow the Clear Dictates of a Rule Does Not Ordinarily Constitute Excusable Neglect.

Petitioners further argue that this Court "should intervene to resolve the multiple and mature splits of authority caused by the Second Circuit's decision." Pet. 11. But the opinion below did not "cause" any of the so-called "splits of authority" described in the petition. Rather, those "splits" are the result of Petitioners' outright mischaracterization of the Second Circuit's opinion for the purpose of manufacturing legal conflicts warranting this Court's review. There are no such conflicts – mature or otherwise – and thus no warrant at all for this Court's intervention.

Before turning to these alleged but fictitious conflicts, it is crucial first to point out what Petitioners entirely, and misleadingly, omit from their discussion of the case law interpreting *Pioneer*. Namely, *every federal court of appeals* to address the question has held, just as the Second Circuit did below, that a failure to follow the clear dictates of a court rule generally does not constitute "excusable neglect." *See Advanced*

(Cont'd)

rules or to attempt to apply them is somehow *less culpable* than a good faith legal mistake in *actually* applying them – is simply mystifying. Petitioners cite no decision so holding, nor are Respondents aware of any case standing for such an extraordinary proposition.

Estimating Sys., Inc. v. Riney, 130 F.3d 996, 998 (11th Cir. 1997) (stating that "no circuit that has considered the issue after *Pioneer* has held that an attorney's failure to grasp the relevant procedural law is 'excusable neglect,' and holding "as a matter of law[] that an attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect.").[8]

This rule is, as discussed above, fully consistent with *Pioneer*. *Pioneer*, 507 U.S. at 392 (stating that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect"). Indeed, to read *Pioneer* to dictate a different conclusion would, as several Circuits have recognized, invite "almost every appellant's lawyer [to] plead

---

8. *Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 8 (1st Cir. 2001) (even where delay was brief and prejudice minimal, absent extraordinary circumstances excusable neglect is not present where untimely filing is the result of "ignorance of the law and inattention to detail"); *Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 879 (5th Cir. 1998) (holding that it would be the "rare case indeed" in which a misinterpretation of federal rules may constitute excusable neglect); *Prizevotis v. Indiana Bell Tel. Co.*, 76 F.3d 132, 133 (7th Cir. 1996) ("'The excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules.'") (quoting *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 515 (2d Cir. 1985)); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000) ("Notwithstanding the 'flexible' *Pioneer* standard, experienced counsel's misapplication of clear and unambiguous procedural rules cannot excuse his failure to file a timely notice of appeal."); *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 825 (9th Cir. 1996) (*Pioneer* did not alter "general rule that a mistake of law does not constitute excusable neglect"; in absence of persuasive justification for misconstruction of nonambiguous rules, general rule forecloses finding of excusable neglect); *see also Deym v. von Fragstein*, 127 F.3d 1102 (6th Cir. 1997) (unpub. opinion) (remarking that post-*Pioneer* cases establish that misreading a rule or statute does not constitute excusable neglect).

his own inability to understand the law when he fails to comply with a deadline." *Advanced Estimating Sys.*, 130 F.3d at 998 (noting consistency between *Pioneer* and rule that "lawyer's misunderstanding of clear law cannot constitute excusable neglect," and rejecting notion that this Court in *Pioneer* "intended a practice that would require courts to be that lenient about disobedience to plain law"); *Graphic Communications*, 270 F.3d at 8 (to excuse error caused by "ignorance of the law and inattention to detail" would "only serve to condone and encourage carelessness and inattention in practice before the federal courts, and render the filing deadline" of Rule 4 a "nullity").

In light of this complete harmony, if not unanimity,[9] among the federal courts of appeals on the specific rule applied by the Second Circuit below, Petitioners' claim of "multiple and

9. To the extent the courts of appeals differ over the precise formulation of this rule, the difference cannot possibly warrant this Court's review. While the Second Circuit holds that a failure to follow an unambiguous rule *ordinarily* is inexcusable, several other Circuits have gone *much further* and held that such a failure *never* can constitute excusable neglect. *See, e.g., Prizevotis*, 76 F.3d at 133; *Lowry*, 211 F.3d at 464; *Advanced Estimating Sys.*, 130 F.3d at 998; *but cf. In re: Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209 (D.C. Cir. 2003) (expressing reservation in dicta concerning *per se* rule, but recognizing that such a rule might be appropriate in the context of untimely notices of appeal). Clearly, if either of these rules warranted review by this Court (and neither of them does), surely the appropriate candidate would be the more stringent *per se* rule adopted by other Circuits, and not the Second Circuit's more moderate, flexible approach – an approach that, as noted above, the court adopted to replace its prior *per se* rule in order to comply more fully with *Pioneer*. *See supra* n. 6. In any event, the difference between the Second Circuit's rule and the *per se* rule of other Circuits is not a difference that could possibly help Petitioners here since the Second Circuit rejected Petitioners' excusable neglect claim even under its more liberal standard.

mature" splits of authority is demonstrably incorrect. The cases Petitioners advance to support these "conflicts" simply confirm that the purported conflicts are illusory. The first "conflict" to which petitioners point is between the Second Circuit, which allegedly holds that a single *Pioneer* factor is dispositive, and the Ninth, Third, and Fifth Circuits, which "have taken the position – faithful to *Pioneer* – that an equitable balancing of all relevant factors is required for a determination of 'excusable neglect.'" Pet. 11-13 (discussing *Bateman v. United States Postal Serv.*, 231 F.3d 1220 (9th Cir. 2000); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315 (3d Cir. 2001); and *In re Eagle Bus. Mfg., Inc.*, 62 F.3d 730, 736-40 (5th Cir. 1995)). Once again, the claimed conflict assumes that the Second Circuit does not *also* require an equitable balancing of all relevant factors. As shown above, *see supra* at 9-15, this assumption is baseless.

Second, Petitioners point to a supposed conflict "over which of the four *Pioneer* factors are entitled to the greatest weight in an excusable neglect analysis." Pet. 13. On one side of the claimed split are courts of appeals that, like the Second Circuit, place the greatest emphasis in the *Pioneer* balancing on the "reason for delay" factor. Pet. 14-15 (citing *Lowry*, 211 F.3d at 463; *Graphic Communications*, 270 F.3d at 5; and *United States v. Thompson*, 82 F.3d 700, 702-03 (6th Cir. 1996)). On the other side of this conflict, Petitioners assert, are decisions of the Eleventh and Seventh Circuits allegedly holding that the "prejudice" and "efficient administration of justice" *Pioneer* factors are to be afforded "primary importance." Pet. 13-14 (discussing *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996); *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1297 (11th Cir. 2003); and *United States v. Brown*, 133 F.3d 993, 996 (7th Cir. 1998)).

Once again, the claimed split does not exist. Nothing in the decisions of the Seventh or Eleventh Circuits remotely suggests, as Petitioners claim, that the general importance given to the "prejudice" and "administration of justice" *Pioneer* factors trumps the well-settled rule that a failure to follow the clear dictates of a rule ordinarily precludes a finding of excusable neglect. Indeed, not one of the decisions cited by Petitioners even implicated that particular rule.[10] Where that rule is implicated, the Seventh and Eleventh Circuits, just like the Second Circuit, routinely and decisively reject claims of excusable neglect. *See Advanced Estimating Sys.*, 130 F.3d at 997-98 (applying rule and rejecting excusable neglect claim where party's attorney misunderstood that ten-day period for filing post-trial motion ran from entry of judgment, not from date on which notice was received); *Prizevoits*, 76 F.3d at 133-34 (same where "highly experienced federal litigator" erroneously believed ten-day period for filing post-trial motion could be extended because attorney was new to case; "the rule is crystal clear, the error egregious, the excuses so thin as to leave the lapse not only unexcused, but inexplicable.").[11]

---

10. *Cheney*, 71 F.3d at 850 (claimed reason for delay was a "failure of communication" between two lawyers); *Advanced Estimating Sys.*, 130 F.3d at 999 (subsequent panel applying rule that Second Circuit applied here, and distinguishing *Cheney* as a "miscommunication case or a clerical-error case"); *In re Worldwide Web Sys.*, 328 F.3d at 1297 (emphasizing that all of the *Pioneer* factors must be considered, and finding no excusable neglect in part where moving party failed to offer *any* reason at all for the delay); *Brown*, 133 F.3d at 997 (finding excusable neglect where counsel completely inexperienced in federal court system misunderstood applicable rule, but reaffirming principle adopted in *Prizevotis* that "the reasons behind some delays will be unexcused no matter what the countervailing factors").

11. In fact, it is particularly ironic that Petitioners would point to the Eleventh and Seventh Circuits as courts that give *less* emphasis to (Cont'd)

Finally, Petitioners point to "an additional divide over what type of conduct is deemed 'excusable' for purposes of the third *Pioneer* factor, *i.e.*, the reason-for-delay." Pet. 15. In the first place, this last alleged conflict is, as stated *by Petitioners*, an alleged conflict over the *application* of a settled legal standard to the facts of particular cases – which is *not* the sort of conflict ordinarily warranting review by this Court. *See* Sup. Ct. Rule 10. In any event, the cases Petitioners cite do not at all conflict over the application of the "reason for delay" factor to particular cases. Petitioners first cite *Bateman v. United States Postal Service*, 231 F.3d 1220, 1224-25 (9th Cir. 2000), for the general proposition that "conduct is excusable if the reason for delay suggests, as in the case of Essef's counsel, mere negligence or carelessness." Pet. 15. But *Bateman* involved the plainly distinguishable facts of an attorney who missed a deadline because he was forced to leave the country for a family emergency. *Bateman*, 231 F.3d at 1222-25. On the facts at issue here, by contrast, well-settled Ninth Circuit precedent dictates the precise conclusion that the Second Circuit reached below. *See, e.g., Kyle v. Campbell Soup Co.*, 28 F.3d 928, 931 (9th Cir. 1994) (no excusable neglect where attorney miscalculated deadline under unambiguous rule without persuasive justification); *Yost*, 92 F.3d at 825 (same); *United States v. Prairie Pharmacy, Inc.*, 921 F.2d 211, 214 (9th Cir. 1990) (attorney's "failure to verify the requirements of the law demonstrates attorney malpractice, not excusable neglect under the law of this circuit").

(Cont'd)
the "reason for delay" factor than does the Second Circuit because, as noted above, these Circuits have gone *further* than the Second Circuit and adopted a *per se* rule precluding excusable neglect where an attorney misunderstands or fails to follow an unambiguous rule. *See supra* at 17 & n.9; *Advanced Estimating Sys.*, 130 F.3d at 998; *Prizevoits*, 76 F.3d at 133.

Petitioners also cite *Yesudian ex rel. United States v. Howard University*, 270 F.3d 969 (D.C. Cir. 2001), in which the court found excusable neglect despite an attorney's "foolish" mistake in applying the wrong court's rules. *Id.* at 971. But *Yesudian's* discussion of the "excusable neglect" standard was dicta because the applicable local rule – unlike Rule 4's mandatory and jurisdictional thirty-day time-period for filing a notice of appeal – was discretionary and permitted acceptance of a late filing even without consideration of the "excusable neglect" standard. *Id.* Moreover, the court's discussion of that standard is simply beside the point because *Yesudian* was not a Rule 4 case involving an untimely notice of appeal. Rather, it involved an untimely opposition brief accepted by a district court – a decision that the court in *Yesudian* expressly noted was a "case management decision[]" entitled to "great deference," *id.*, and that the D.C. Circuit subsequently has recognized must be analyzed quite differently from a decision to excuse an untimely notice of appeal. *See In re: Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1210 (D.C. Cir. 2003) (distinguishing application of excusable neglect standard to district court's case-management decisions from the Rule 4 context, which presents "an issue of special interest to the courts of appeal"). Finally, *Yesudian* is plainly distinguishable because it involved an attorney's legal mistake that, according to the court, was justified because of an apparent error in the Westlaw database. *Yesudian*, 270 F.3d at 971 (noting that any "researcher looking in Westlaw" could have been misled into making the same mistake). Thus, the rule that a failure to follow an *unambiguous* procedural rule generally forecloses a claim of excusable neglect was plainly not applicable in *Yesudian*. *Accord Pioneer*, 507 U.S. at 398 (excusing neglect where notice informing party of deadline contained a "dramatic ambiguity" that could confuse

experienced bankruptcy practitioners); *compare Kyle*, 28 F.3d at 931 (distinguishing cases involving ambiguous rules, such as *Pioneer*, from claims of excusable neglect involving unambiguous rules).

III. This Case Would Be An Exceedingly Poor Vehicle For Resolving the Question Presented.

Even if there were some need for this Court to provide further clarification or guidance on the proper application of *Pioneer*'s equitable balancing test – and there is not – for two reasons this case would be an exceedingly poor vehicle in which to do so.

First, regardless of the conclusion dictated by *Pioneer*'s equitable balancing test, the district court was nonetheless obligated to reject Petitioners' request for an extension of time in which to file their notice of appeal under Rule 4(a)(5). The court was so obligated because Petitioners failed to serve their Rule 4(a)(5) motion on *all the parties* to this action – including seven of the twelve plaintiffs who are entitled to share in the punitive damages award rendered in Respondents' bellwether case – within the thirty-day grace period set forth in Rule 4(a)(5). And it is well-settled that a failure timely to comply with Rule 4(a)(5)(B)'s "mandatory and jurisdictional" notice and service requirement deprives the district court of jurisdiction to entertain a Rule 4(a)(5) motion. *Hamzi v. Minnesota Mut. Life Ins. Co.*, 196 F.3d 372, 373 (2d Cir. 1999); *Oda v. Transcon Lines Corp.*, 650 F.2d 231, 233 (10th Cir. 1981); *Hable v. Pairolero*, 915 F.2d 394, 396 (8th Cir. 1990); *Malone v. Avenenti*, 850 F.2d 569, 572-73 (9th Cir. 1988); *Truett v. Johns-Manville Sales Corp.*, 725 F.2d 1301, 1302 (11th Cir. 1984).

Respondents advanced this argument in their motion to dismiss the appeal for lack of jurisdiction, but the Second Circuit declined to address it. Thus, in order for this Court even to reach

the merits of the question presented by the petition, the Court first would be compelled to resolve this antecedent jurisdictional question. And if the Court ultimately were to conclude, as Respondents maintain it must, that the district court lacked any authority even to apply *Pioneer*'s equitable test given Petitioners' failure to comply with Rule 4(a)(5)'s service and notice requirement,[12] a grant of certiorari on the *Pioneer* question ultimately would be for naught. The presence of this threshold procedural obstacle to this Court's ability to address the merits of the question presented is an additional reason to deny the writ of certiorari.

---

12. Petitioners likely will argue, as they did below, that the purpose behind the notice requirement is satisfied here, despite their service failures, because all of the parties received *actual notice* of the Rule 4(a)(5) motion through the court's briefing schedule. But even if actual notice absent formal service were sufficient to satisfy Rule 4(a)(5)'s requirements – Petitioners cited no case so holding below – the rule nonetheless requires, at the least, that such notice be received *within* the 30-day grace period. Fed. R. App. P. 4(a)(1), 4(a)(5)(B). Because that grace period elapsed on March 29, 2002 – several days *before* the district court sent notice of Petitioners' motion to the parties – Petitioners cannot possibly show that the parties had "actual notice" within the relevant time period. (Indeed, Petitioners failed even to *file* their motion with the court by March 29; the district court, however "deemed" the motion filed as of that date. *See* Memorandum in Support of Plaintiffs'-Appellees' Motion to Dismiss the Appeals for Lack of Jurisdiction 17 n.6). Petitioners further argued below that they complied with Rule 4(a)(5)'s notice and service requirements because they timely served counsel for Respondents John and Joyce Silivanch, who acted as *liaison* counsel to the other plaintiffs in this action. This argument is meritless, however, because the rule requires service on all, not some, of the parties, and Respondents' counsel clearly did not represent the other plaintiffs And it is undisputed that Petitioners failed to provide timely notice to fourteen of the twenty-two plaintiffs whose cases they sought to appeal by means of their Rule 4(a)(5) motion.

Second, even if the district court had authority to grant an extension of time under *Pioneer*, this case is clearly the wrong vehicle for this Court to resolve the question presented. It is the wrong vehicle because one of the additional *Pioneer* factors – whether the party seeking an extension acted in good faith, *Pioneer*, 507 U.S. at 395 – weighs heavily against Petitioners. As described above, Petitioners first argued that their untimely filing constituted "excusable neglect," in part, because they did not have notice of the final judgment. But Petitioners later were compelled to abandon this contention given uncontradicted evidence that they did, in fact, have such notice. In other words, by conceding notice of the date of the final judgment, Petitioners effectively admitted that their first effort to obtain equitable relief for their untimely filing was supported, in part, on a complete fabrication, and thus not offered in "good faith" under *Pioneer*. *See* Pet. App. 26a & n.12 (holding that Petitioners "did indeed receive clear notice that final judgment had been entered").

Although Respondents presented this bad faith argument to the Second Circuit, the court, applying the rule governing negligent failure to follow the dictates of unambiguous rules, had no occasion to address it. Petitioners appear to assume that the issue of their lack of good faith is thus no longer relevant: Although they argue repeatedly that the Second Circuit erred by failing adequately to consider *all* of the *Pioneer* equitable factors, they conveniently, and misleadingly, omit any discussion of this important equitable factor.[13] But it is indisputable that, if

---

13. Indeed, indicating a tacit awareness that their bad faith may be fatal to their "excusable neglect" claim, and compounding their pattern of misrepresentations in this case, Petitioners, shockingly, *misrepresent Pioneer*'s test in the petition as excluding a good faith requirement altogether. *See, e.g.*, Pet. 9 ("This Court [in *Pioneer*] provided a framework with which to analyze [excusable neglect] claims, including

(Cont'd)

this Court were to grant the petition, it could not reverse the decision below without deciding whether Petitioners' conduct constituted bad faith, and if so, how such bad faith affects the equitable calculus under *Pioneer*. *Cf. Pioneer*, 507 U.S. at 398 (reversing lower court's rejection of excusable neglect claim on the ground that court focused only on reason for delay factor, but noting that it would have affirmed had there been "any indication at all of bad faith"). This additional fact-sensitive inquiry standing between Petitioners and any potential relief by this Court makes a grant of certiorari particularly inappropriate.

Indeed, the evidence of Petitioners' bad faith not only seriously complicates the *Pioneer* analysis that this Court would be required to undertake if it were to grant the petition; it actually renders *irrelevant* (or at least potentially so) the question presented. The thrust of Petitioners' complaint is that the Second Circuit gave exclusive emphasis to *Pioneer*'s "reason for delay" factor and simply ignored the remaining equitable factors. As Respondents demonstrated above, the argument is patently false because the court considered several equitable factors as part of its analysis. In any event, if this Court were inclined to address the question whether a lower court may place "exclusive" emphasis on the "reason for delay" factor, surely it should do so in a case in which that factor is the *only* plausible equitable ground supporting a lower court's rejection of an "excusable neglect" claim. Where, as here, a lower court's excusable neglect holding can be, and is, supported by the

---

(Cont'd)
four specific factors: (1) prejudice to other parties; (2) length of the delay; (3) reason for the delay; and, (4) effect on judicial proceedings.") (citing *Pioneer*, 507 U.S. at 395); *see id.* at 2 (same). But the very page of the *Pioneer* opinion to which Petitioners point unambiguously includes "good faith" as one of the four relevant equitable circumstances comprising the "excusable neglect" test.

additional equitable circumstance of "bad faith," the issue of a court's "exclusive" emphasis on the "reason for delay" factor becomes purely academic, and thus entirely unsuitable for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ORIN SNYDER
Counsel of Record
STEVEN M. HAYES
ROBERT A. JACOBS
PARCHER, HAYES & SNYDER
A PROFESSIONAL CORPORATION
500 Fifth Avenue, 38th Floor
New York, NY 10110
(212) 382-0200

Counsel for Respondents
John and Joyce Silivanch